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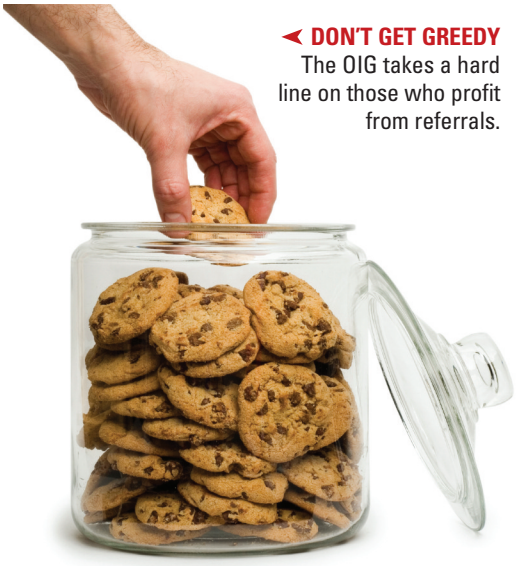
# Anesthesia's Profits Are Off-Limits

## The OIG rejects another attempt to extort anesthesia fees.

The Anti-Kickback Statute is fairly straightforward: It prohibits rewards for referrals. And yet hospitals, surgery centers, physician-owners and others continue to structure shady deals to squeeze extra income out of anesthesia providers. In a recent advisory opinion, federal authorities once again make it clear: Those who seek to profit from anesthesia services are asking for trouble.



**DON'T GET GREEDY** The OIG takes a hard line on those who profit from referrals.

### Facts of the case

I represented an anesthesia group that requested that recent ruling (**tinyurl.com/kbkepgq**) from the Department of Health and Human Services' Office of Inspector General. The group had enjoyed an exclusive contract with a hospital to provide all of its anesthesia services, until a psychiatric group — whose owners included a psychiatrist board-certified in anesthesiology — relocated to the hospital in 2010.

As the group negotiated its contract for the following year, the hospital demanded that the psychiatrist-anesthesiologist be allowed to anesthetize the electroconvulsive therapy (ECT) patients who comprised the bulk of the psychiatric group's practice, independent of the hospital's anesthesia contract.

The next year's contract negotiations amended this carveout, requiring the anesthesia group to provide coverage for the psychiatrist and including an "additional anesthesiologist provision." This provision let the psychiatric group determine whether another provider was needed for ECT anesthesia. If so, the anesthesia group could negotiate to provide those services.

When the need for an additional provider arose and the anesthesia group began to negotiate, the hospital proposed the following arrangement. In pro-

viding the services for ECT cases, the anesthesia group would reassign its right to bill and collect for the services to the psychiatric group. The psychiatric group would then pay the anesthesia group a per diem rate, and keep the difference between that rate and the amount it collected.

## Authorities' analysis

The anesthesia group presented this proposed arrangement to the OIG, which has stated on numerous occasions that an opportunity to generate a fee can be considered illegal remuneration under the Anti-Kickback Statute, even if no payment is made for referrals.

In the resulting advisory opinion, the OIG ruled that the proposed arrangement wouldn't qualify for protection under the statute's safe harbors for personal services and management contracts. Those only apply to payments made by a principal to an agent. No safe harbor would protect the funds that the psychiatric group would net from the anesthesia group.

Failure to comply with a safe harbor doesn't necessarily render an arrangement illegal. But, the OIG continued, the proposed arrangement seemed designed to permit the psychiatric group to do indirectly what it could not do directly; that is, gain compensation (a portion of the anesthesia group's revenues) in return for referring patients to the anesthesia group for anesthesia services.

Although it wasn't officially stated within the scope of the opinion, the OIG said it couldn't exclude the possibility that:

- the hospital pushed for the initial carveout to reward the psychiatric group for referring patients to the hospital;
- the hospital leveraged its control over anesthesia referrals to induce the anesthesia group to agree to the carveout; and
- the anesthesia group agreed to the carveout in exchange for access to the hospital's stream of anesthesia referrals.

The OIG concluded that the proposed arrangement could potentially be seen as generating prohibited remuneration under the Anti-Kickback Statute, and that the office could potentially impose administrative sanctions in connection with it.

## The bottom line

This advisory opinion once again demonstrates a fact lost to many when discussing "company model" controversies and similar potential Anti-Kickback Statute violations: that they generally don't fit into an available safe harbor, such as the personal services or employment safe harbors.

This is not just because payment to the referral-receiving physician is not set in advance and will vary with the value or volume of referrals, but also because those safe harbors only apply to payments from a principal to an agent, not to payments from an agent (the anesthesia group) to the principal (the psychiatric group). In this case, the discount that permits the referral source to profit from the arrangement (the difference between the per diem and the amount collected for services rendered) is a payment to the principal.

An arrangement that doesn't fit the safe harbor isn't in and of itself fatal, but the opportunity to profit from one's referrals raises significant concerns of prohibited remuneration, and may trigger anti-kickback violations. As the OIG points out, the hospital's grant of anesthesia services rights to a referral source might itself be a kickback. This is completely on point with anesthesia contracts between ASCs and "anesthesia companies" controlled by surgeons who bring their cases to the facilities' ORs. Anyone considering entering into an arrangement that potentially violates the federal Anti-Kickback Statute is well advised to first consult with counsel who'll survey its legality. **OSM**

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$46 MILLION WHISTLEBLOWER LAWSUIT

# Calif. Health System Settles Anesthesia Billing Lawsuit

Sutter Health, a not-for-profit network that operates 24 hospitals in northern California, has agreed to pay $46 million to settle a whistleblower lawsuit that accused it of misconduct in its dealings with patients and insurers, according to an announcement issued by the state's Department of Insurance last month (**tinyurl.com/pvky7c4**).

In the lawsuit, filed in 2011, Rockville Recovery Associates, the billing auditor that filed the lawsuit, and the insurance commissioner alleged that Sutter falsely and misleadingly double-dipped when billing for surgical anesthesia. Patients and insurers were charged 3 times: once for the anesthesia contractor's services, once for the OR facility fee and once for "Code 37x Anesthesia."

The lawsuit's plaintiffs found that the services for which "Code 37x" billed — fees that often totaled thousands of dollars per patient — were covered by the OR facility fee. They also argued that Sutter often billed for anesthesia contractors' services based on the time they spent on the case, even though they were not Sutter employees. The settlement requires Sutter to bill a fully disclosed flat fee.

Besides the payment — which will be divided between Rockville and the state of California — the settlement also requires Sutter Health to:

- itemize its anesthesia billing charges;
- list what these anesthesia services cost it, by posting (and annually updating) this information on a public website and sending it to insurers and the state's insurance commissioner;
- explain the process by which the amounts on its charge master schedule are calculated into patients' bills and insurers' claims; and
- let insurers contest bills, which the lawsuit claimed Sutter's contracts had previously restricted.

Sutter Health did not admit to wrongdoing in the settlement.

*— David Bernard*